

IN THE UNITED STATES COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

KIMON WHERLEY

Plaintiff

v.

JOHN SCHELLSMIDT AND UNJOO  
SUH SCHELLSMIDT individually and  
d/b/a as AUDIO DEPOT

Defendants

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CIVIL ACTION NO.

3:12-CV-0242-D

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**PLAINTIFF'S PROPOSED VOIR DIRE QUESTIONS**

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In accordance with the Court's Trial Setting Order (Dkt. 15), Plaintiff Kimon Wherley files these proposed voir dire questions:

**Hardships/Conflicts**

1. This trial is likely to run [#] of days—it may run longer or shorter. Please tell me if you have any professional, personal, religious, family, childcare, or any other conflict or obligations that would prevent or affect—even in the slightest—your ability to participate in this trial?

**Litigation Experience**

2. Have you—or any family member or friend—even been involved in a lawsuit of any kind as party or witness? Are you or they currently involved in any lawsuit?

a. If so, please tell me about that.

b. Was it a positive, negative, or neutral experience? Why?

**Prior Jury Experience**

3. Have you ever sat on a jury before in any type of case?

- a. If so, what type of case?
- b. Was there a verdict in the case?
- c. Have you ever served as a foreperson?
- d. Is there anything about your prior jury experience that might affect your ability to act as a juror in this case?

**Educational Background and Training**

- 4. What is your educational background from high school going forward?
  - a. If you attended college, what school did you attend?
  - b. What area(s) of study, if any, did you major or concentrate?
  - c. Did you graduate?
- 5. Have you ever taken any courses or received any training or instruction related to:
  - a. ... the law? If so, please explain.
  - b. ... Human Resources, Personnel, or wages and benefits? Please explain.
  - c. ... Accounting or taxes? If so, please explain.

**Employment History**

- 6. What is your occupation?
- 7. What is your position/title?
- 8. How long have you worked in that position?
- 9. Who is your current employer?
  - a. How long have you worked for your current employer?
- 10. Are you paid by the hour?
  - a. ... on a salary?
  - b. ... some other basis (e.g. commissions, piece-rate, etc.)? Please explain.
- 11. Do you get paid overtime if you work over 40 hours in a week?

12. How many of you have earned more than \$100,000 in a year from employment?
13. Where did you work before your current employment? What was your job?
14. Have you—or any family member or friend—ever worked:
  - a. ... in a lawyer's office? If so, please tell me more.
  - b. ... for an insurance company? If so, please tell me more.
  - c. ... for the government—federal, state, local, or any other? Is so, please tell me more.
15. Are you a member of any charitable, community, or service organization? If so, what do you do to participate in that organization? How often?
16. Do you consider yourself very conservative, somewhat conservative, moderate, somewhat liberal, or very liberal?
17. Are you or a family member a member of a labor union? If so, have you or your family ever filed a grievance against an employer? For what? What was the outcome?

### **Employment Complaint History**

18. Have you—or any family member or friend—ever made a claim for:
  - a. ... unpaid overtime? If so, please tell me about that.
  - b. ... being misclassified as an independent contractor? If so, please tell me more.
  - c. ... for retaliation at work? If so, please tell me about that.
19. Have you read or heard anything about overtime complaints by an employee against his/her employer? If so, please explain.
20. Have you read or heard anything about complaints about an employer's misclassification of employees as independent contractors? If so, please explain.
21. What opinions do you have about people who bring lawsuits against their

employer?

**Knowledge about this Case**

22. In this case, Plaintiff Kimon Wherley asserts a claim under federal wage and hour law by asserting that (1) Defendants failed to pay him overtime compensation for hours worked over 40 in a workweek, and (2) Defendants retaliated against him for filing a complaint with the U.S. Department of Labor about Defendants' failure to pay him overtime. Have you ever read or heard anything about this case prior to today? If so, please explain.

23. Do any of you know the Plaintiff Kimon Wherley? If so, how do you know him? And for how long have you known him?

24. Do any of you know the Defendants, John Schellsmidt and Un Joo Suh Schellsmidt? If so, how do you know him/her? And for how long have you known him/her?

25. Defendants operate a car audio/visual and window tint installation business in Arlington, where Mr. Wherley worked. The business is called Audio Depot. Do any of you know of Audio Depot? If so, please explain how.

a. Have you—or any family member or friend—ever been a customer of Audio Depot? If so, please tell me more.

b. Have you—or any family member or friend—ever been an employee or independent contractor of Audio Depot? If so, please tell me more.

c. If so, was your experience with Audio Depot a positive, somewhat positive, negative, somewhat negative, or neutral experience? Please explain.

26. The lawyer representing Defendants is R.S. "Rob" Ghio of the Law Offices of R.S. Ghio. Mr. Wherley's attorney is Barry Hersh of Hersh Law Firm PC and Brian Sanford of Sanford Bethune. Have you—or any family member or friend—ever had any dealings with either of the lawyers in this case? If so, please explain.

27. Do any of you know \_\_\_\_\_? [List the witnesses identified on the parties' Witness Lists as expected to be called in this matter, if other than the parties.] If so, how do you know him/her?

28. As you look around the courtroom, do you recognize anyone, including anyone else that is a prospective juror? If so, who? How do you know them?

**Experience as an Independent Contractor**

29. Are you now—or have you ever been—labeled an independent contractor or contract labor? If so, please tell me about that.

- a. What type of work did you perform?
- b. Was the work engagement for a specific project/assignment, or was it a long-term/indefinite engagement?
- c. How long did this engagement last?
- d. Did the business that you were performing work for also use people classified as employees to perform the same or similar work that you performed?
- e. Was it your decision to be treated as an independent contractor or did someone else make that decision?
- f. If not you, then who made that decision?
- g. Why do you think that decision was made?
- h. Do you have an opinion on whether employers label workers as independent contractors in order to avoid complying with employment laws or paying employment taxes? If so, what is your opinion?

**Experience as a Business Owner**

30. Have you—or any family member or friend—ever owned a business? If so, please tell me about that.

- a. What type of business? When? Where?
  - b. Has the business now or ever had workers classified as employees (other than family members)? If so, how many employees?
  - c. Has the business now or ever used workers classified as independent contractors or contract labor? If so, please explain?
    - i. If so, how many? When?
    - ii. Are/were these contractors used on a project-by-project type-basis or for an indefinite term?
    - iii. Do/did these contractors perform the same kind of work that is/was performed by the business's employees?
31. Has the business now or ever been involved in a lawsuit or complaint by an employee or contractor? If so, please explain.
32. Are you now or have you ever been in Management?
- a. If so, what was your title? What were your duties?
  - b. For how long?
  - c. How many people reported to you?
  - d. Did you or do you participate in personnel-related decisions (e.g. hiring, firing, performance reviews, compensation, disciplinary action, or terminations)?
  - e. What is the company's name?
  - f. If you are no longer in Management, why not?
33. Are you now or have you ever worked in a supervisory position?
- a. If so, what was your role? What were your duties?
  - b. For how long?
  - c. How many people reported to you?

d. Did you or do you participate in personnel-related decisions (e.g. hiring, firing, performance reviews, compensation, disciplinary action, or terminations)?

e. What is the company's name?

f. If you are no longer in a supervisory position, why not?

34. For those of you who have worked in a supervisory or management position, have you ever received a complaint from an employee or contractor concerning their pay or benefits?

a. If so, please explain.

b. What was the outcome?

c. How did you respond?

d. Was that experience positive, somewhat positive, negative, somewhat negative, or neutral?

### **Feelings Regarding Overtime**

35. What are your feelings or opinions—one way or another—concerning laws requiring employers to pay overtime compensation?

a. Do you believe that those laws necessary? Why or why not?

b. Do you believe that those laws are fair? Why or why not?

36. Is there anyone here who believes that there may be some circumstances when it is acceptable or excusable for an employer not to pay overtime to an employee when the law requires it? If so, please explain.

37. The laws guaranteeing overtime pay cannot be waived by private agreement. Do you believe that, regardless of what the law says, an employer should be allowed to reach an agreement with an employee where the employee works overtime without receiving overtime pay... for example, in exchange for a raise? Please explain why or why not.

38. Some folks think that, if someone files a complaint for unpaid overtime with the

Department of Labor, they should not be allowed to also file a lawsuit. Other folks think that people should be allowed to file a lawsuit even if they file a complaint with the Department of Labor because—for example—they may be dissatisfied with how the Department of Labor handle the complaint or the Department of Labor does not try to collect all monies that they are due under the law. Which group of folks are you closer to in your opinion? Why?

39. Do you believe than an employer is more likely to be truthful than would be a former employee who has sued that employer?

40. Do you have a view as to whether employees should be able to object when they believe that their employer is not complying with the law? What is your opinion?

41. Have you ever had to work overtime and not get paid for it? Please explain.

42. Do you feel that an employee has an obligation not to sue his employer even when the employee feels that the employer violated his rights? Please tell me more.

a. Does your answer change if—for example—the employer loaned or advanced money to the employee or provided him/her some other benefit? If so, please tell me more.

43. Have you ever been in a situation at work where your boss or employer says that you made or participated in a work-related decision—when, in fact, you did not?

a. Please explain.

b. Why do you think the boss or your employer said that you made or participated in the decision?

### **Feelings Regarding Bankruptcy**

44. Have you—or any family member or friend—ever filed for bankruptcy protection? If so, please tell me more.

45. During the period that Mr. Wherley was not paid overtime wages by Defendants,



he had to file for bankruptcy. Some people think it's perfectly okay to file for bankruptcy; other people think most of the time filing for bankruptcy is irresponsible. Which way do you lean?

**Ability to Award Just Damages**

46. In this type of case, money damages are the only form of compensation that can be paid to a plaintiff for his harm or loss. You must accept the fact that we cannot restore things exactly the way they were before Mr. Wherley's employment with Defendants ended. Would you feel justified, if the testimony is sufficient, in determining as a verdict an amount of money to be paid to Mr. Wherley to compensate him for his unpaid overtime wages? Please explain.

47. Do any of you have an opinion—one way or the other—about financially compensating someone for losses that the person has suffered?

48. The Plaintiff in this case claims he is entitled to recover thousands of dollars to compensate him for his overtime work. Under our system of law, if the Plaintiff proves his case, the members of the jury are required to award him his unpaid overtime wages. Is there anything in your background or beliefs that would prevent you from awarding the Plaintiff his damages if he proves under the law and the evidence that he is entitled to recover those damages?

**Ability to Follow Court's Instructions**

49. In trials like this, the standard of proof is different than the standard of proof used in a criminal case. Plaintiffs do not need to establish their case "beyond a reasonable doubt." Rather, jurors make their decision on the basis of whether the Plaintiff is "more likely right than wrong." Some folks think that "more likely right than wrong" is not fair because it makes things a little too easy for the Plaintiff and a little too hard for the Defendants. Other folks feel that it is okay? Are you a little closer to the folks who think it's a little unfair—too easy for the Plaintiff? Or are you a little closer to the people who think its okay? Tell me more.

50. At the conclusion of all the evidence and after closing arguments, the court will

instruct you concerning the law. Will you apply the law as given by the court even though you might not agree with it? Will you honestly and to the best of your ability determine each question of fact submitted to you in the lawsuit on the basis of the evidence presented in the courtroom and the law that the Court will instruct you in, and on that basis only?

**Miscellaneous**

51. Do you think there are too many frivolous lawsuits?
52. Do any of you believe that people should resolve problems without filing a lawsuit?
53. Do you think people turn to courts too often to resolve their problems?
54. Do you support Texans Against Lawsuit Abuse, Citizens Against Lawsuit Abuse, or any similar type of organization?
55. Do you know of anyone who is against lawsuits as a way to resolve a dispute?
56. Being a good juror and a good citizen means that, if this case is not the right one for you to serve on, then you should let the Court know. Is there any reason—be it religious, moral, personal, business, or a conviction that you may have—that might, in your opinion, prevent you from rendering a verdict based on the evidence without any prejudgment or favoring one side over the other? If so, please raise your hand.
57. From what you have heard thus far about the case, the type of lawsuit, the parties, the lawyers or the witnesses who may testify, are there any of you who believe that you or your family could be affected in any way by the outcome of this lawsuit?
58. From what you have heard thus far about the case, the type of lawsuit, the parties, the lawyers or the witnesses who may testify, are there any of you who favor Mr. Wherley over the Defendants? How about those who favor the Defendants or Mr. Wherley. Why?

59. Is there any question the Court should have asked you that would have told the Court and the lawyers a lot about how you feel about a case like this?

Respectfully submitted,

/s/ Barry S. Hersh

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed using the Northern District's CM/ECF system which is to send notice of service of the foregoing filing to all opposing parties by and through their attorney(s) of record via e-mail. Certified on this 20th day of January 2014.

/s/ Barry S. Hersh

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Barry S. Hersh